No. 699

In the Supreme Court of the United States

OCTOBER TERM, 1957

SING KEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 53–64, C. A. 84a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 6, 1957 (C. A. 96a). The petition for a writ of certiorari was filed on January 2, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in permitting cross-examination of a defense witness which showed that he had invoked the Fifth

Amendment at grand jury proceedings when, on direct examination, the defense had questioned the witness as to the scope and truthfulness of his testimony at those proceedings.

2. Whether the government was required to show that copies of petitioner's income tax returns, used in cross-examination to refresh his recollection, were obtained in compliance with federal regulations when petitioner raised no question as to their proper procurement.

STATEMENT

A five-count indictment returned in the United States District Court for the Southern District of New York charged petitioner with crimes incident to procuring the illegal entry of Chinese aliens into this country. Count 1 charged a conspiracy with others under 18 U. S. C. 371, from 1949 to 1956, to induce the entry of ineligible aliens into this country, to procure documentary evidence of citizenship for them, and to make false statements in connection with passports, in violation of 8 U. S. C. 1324, and 18 U. S. C. 1425 and 1542. The remaining four counts charged petitioner with substantive violations of 18 U. S. C. 1542 by making false statements in applications for passports on four separate occasions in 1951 and 1952 (Pet. 65). After a jury trial, petitioner was found guilty on the first four counts (R. 1033).[1] He was sentenced to 2½ years imprisonment and a fine of $1,500 on each count, the prison sentences to run concurrently (R. 1049–1050).

[1] The fifth count was dismissed at the close of the government's evidence (see Docket B).

1. This case arose out of the illicit traffic of Chinese aliens claiming derivative citizenship as sons of American citizens. Chinese-American citizens or alleged citizens, married in China while on visits to that country or before original entry into the United States, would make fictitious reports to the immigration authorities of sons born to them in China or would fail to report the deaths of sons who had resided in China. Immigration records would accordingly list a citizen son—a "paper son"—not actually in existence. The "slot" thus created would be sold by the "parent" to a Chinese in the United States who desired to bring over a youth comparable in age to the fictitious son. This "son" needed to know basic facts about the history of the family of which he claimed to be an offspring. In addition, necessary passports and supporting affidavits had to be secured.

These needed services, the government's evidence showed, were performed by petitioner, who operated a travel service (see *infra*, pp. 4–6). He prepared coaching books or family histories called "halgoons". He received fees ranging from $400 to $600, part of which he paid to others. He had the services of a notary, and was assisted in the preparation of passport affidavits by an attorney whom he usually paid $25 (R. 380–385). Another attorney followed the passport applications through the State Department for fees of from $25 to $100 and both attorneys helped transmit the affidavits and applications to appropriate authorities (R. 355–377, 387). A physician and a serologist took blood tests to establish whether any alleged son had a blood type incompatible with that

of an alleged father (R. 482). If the applications were denied, petitioner referred the "parents" to an attorney, Samuel Waterman, who would file suits in the federal courts under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, on behalf of the "parents" for declaratory judgments that their "sons" were citizens (*infra*, pp. 5, 6). Between mid-1951 and December 24, 1952, the date after which such suits could no longer be brought by reason of the provisions of the Immigration and Nationality Act of 1952, 66 Stat. 281, and 8 U. S. C. 1503, 66 Stat. 273, Waterman filed between 50 and 75 such cases referred to him by petitioner (R. 652–654).

2. Specifically, with respect to the passport frauds charged in the indictment, the government's evidence showed, *inter alia:*

A Chinese restaurant owner, desiring to sponsor the admission of two alien boys into this country, purchased slots of two fictitious persons, Ng Quock Keung and Jew Sun Ai, from two "fathers" (R. 28, 166, 182, 307). The "fathers" supplied petitioner with family histories (R. 39, 311) and the sponsor furnished pictures of the boys he wanted admitted (R. 170, 186). Petitioner prepared a "halgoon" for each case, giving copies to both the sponsor and the "fathers" (R. 39, 173, 187, 316). He had prepared and had notarized (without the affiants being present (R. 56–57, 314)) affidavits which were sent to Hong Kong, in one case to the applicant, the other to the U. S. Consulate (R. 173, 385–387). He was paid $400 by the sponsor (R. 174). The impersonator of Ng Quock Keung was admitted to this country (R. 62). Petitioner

assisted the boy and his "paper father" to obtain certificates of citizenship under their assumed names (R. 78–80). The application of Jew Sun Ai for a passport was denied (R. 200). Petitioner sent his "father," Hom Ing Gim (who had entered this country as Jew Ing Gim), to the office of attorney Waterman who filed a civil complaint for a declaratory judgment that Jew Sun Ai was a citizen (R. 200, 320).

Another witness, Moy Mun Sing, testified that, when he sought petitioner's assistance in bringing his true son to this country, petitioner offered him $1,500 for an extra "slot" which the father had created by reporting the birth of a daughter as a son (R. 565, 570, 572). Moy Mun Sing signed, along with the affidavit for his son, another affidavit bearing the picture of a boy whom he did not know, identified as the second son (R. 571, 574). Both the true and false affidavits were notarized at a later time and sent to the U. S. Consulate through an attorney (R. 387). When passports were denied, petitioner sent Moy Mun Sing to Waterman's office. The witness signed a complaint which was not read to him and which, in reality, was a claim in relation to the false "slot" and not to his true son (R. 577).

Chin Kung Chee, who entered this country under the "paper name" of Sum Yuen Quay, went to petitioner for help in getting his true son, whose real name was Chin Nin Oon, into the country under a slot for Sum Nin Oon (R. 518–521). Petitioner had affidavits prepared which Chin signed and which were notarized later and submitted to the Consulate (R.

530). Chin paid petitioner $200 and was to pay him $300 more when the boy arrived (R. 531). On his third visit to petitioner, Chin Kung Chee told petitioner of the assumed family name (R. 523). When a passport was denied, petitioner sent Chin Kung Chee to Waterman's office (R. 532–533). A complaint was filed under the assumed names (R. 537).

The "fathers", Hom Ing Gim (alias Jew Ing Gim), Moy Mun Sing, and Chin Kung Chee (alias Sum Yuen Quay), identified their handwriting on the complaints for declaratory judgments introduced at the trial (R. 319, 537, 577). Each said he had been taken to a lawyer's office by petitioner's assistant and had signed papers he could not read and which were not read to him (R 320–322, 577–578, 533, 536–537, 556). Hom Ing Gim said there was a white man present but he did not talk to him (R. 322); Moy Mun Sing said he did not know Waterman (R. 578); and Chin Kung Chee said that he did not retain Waterman but that when he was taken to the lawyer's office there were two white men present—that they did not talk to him (R. 536, 538).[2]

3. Petitioner took the stand in his own defense (R. 706 *et seq.*). He conceded that he had assisted in bringing in many sons and had attempted to bring in others. He denied knowledge of the fraudulent nature of any of the claims and denied that he had prepared any "halgoons" (R. 718 *et seq.*), or tried to buy a "slot" (R. 808). He claimed that he had re-

[2] The government's evidence also showed petitioner's involvement with the users of "slots" of Chin Seu Loon and Chin Sung Hong, both in reality deceased (R. 407–466, 468–499).

ceived only small sums for expenses, although he admitted that he had netted $23,000 in 1951 and 1952 after expenses (R. 861–878).

Apart from character witnesses, attorney Waterman was the only other defense witness (R. 590). He testified that the information upon which he had brought suits claiming citizenship was given him by the "fathers," that he had no knowledge of any fraudulent claim, and no reason to believe that petitioner had any such knowledge. In this connection he testified that he had met and talked with Hom Ing Gim, Moy Mun Sing, and Chin Kung Chee prior to filing complaints on behalf of their "sons" (R. 595, 620, 628). With regard to fees, he testified that "my record shows" Jew Ing Gim paid $150 through petitioner (R. 602). He testified that the other "fathers" paid nothing (R. 627, 634).

As part of Waterman's direct testimony, defense counsel asked and received the following questions and answers (R. 618):

> Q. By the way, Mr. Waterman, were you a witness before the Grand Jury?
>
> A. I was, sir.
>
> Q. And did you give the Grand Jury the same testimony that you are giving us here, substantially?
>
> A. Well, if I was asked the same questions.
>
> Q. Was the testimony true that you gave to the Grand Jury?
>
> A. As far as I know, yes, sir.
>
> Q. What I mean is, was it true, as far as you knew?
>
> A. That's right.

Q. And you had your files with you?
A. I think I did.

On cross-examination, Waterman turned over to government counsel "all" the papers with reference to Jew Ing Gim. He said that he had no financial records with him at trial but that he had an independent recollection of the fee paid (R. 640).

After he had reiterated his belief that "everything I said here today is consistent with what I said before the Grand Jury" (R. 644), the cross-examination revolved largely around what he had said before the grand jury. Although defense counsel objected initially to the manner in which government counsel was "skipping" "out of context" in reading the grand jury minutes (R. 645), and several times raised a question as to whether specific testimony was inconsistent (R. 668, 681), he made no serious objection while Waterman was questioned about his grand jury testimony with regard to who sent a certain client to him (R. 645), who accompanied clients to his office (R. 656), whether his records revealed that he saw Chin Kung Chee personally (R. 660), whether he saw Moy Mun Sing and Jew Ing Gim personally (R. 681, 682),[3] whether in fact he was always present when clients called (R. 667), and how he was paid in one case, *i. e.*, by cash or check (R. 691).

[3] In the grand jury proceedings, Waterman testified that his records would not show whether he talked to Chin personally; he was not sure that he had talked with either of three of the "fathers" personally. At the trial, he testified that he had refreshed his recollection after his grand jury appearances and remembered going over the details with them before filing the cases (see R. 684).

Waterman then testified on cross-examination that petitioner in most of these cases collected and forwarded the fees from the clients (R. 692). When asked what he did with the money, he answered that he put it in a checking account, naming the bank, and that he kept records by writing down the receipts in check book stubs and in the individual case files (R. 692–693). The court then sustained an objection to government counsel's inquiry as to whether Waterman considered these latter answers incriminating (R. 693). After a bench conference, the court permitted government counsel to ask Waterman if he had been asked during the grand jury proceedings what he did with his payments, in what bank did he deposit them and what sort of books and records he kept (R. 696–697). When Waterman said he could not remember how he answered these questions at that time (R. 697), the court permitted government counsel to bring out, over objection, that Waterman had invoked his Fifth Amendment privilege not to answer them (R. 699–700). The court at the time instructed the jury that the raising of this issue was not in any way to reflect upon the defendant (R. 701).

ARGUMENT

1. Petitioner argues, as he did below, that the trial court committed prejudicial error in permitting the government to bring out on cross-examination of the witness Waterman testimony that he had invoked the Fifth Amendment at a grand jury hearing with respect to matters as to which he testified at the trial. However, as the court below pointed out, it was the

defense that first introduced on direct examination the matter of testimony given at the grand jury proceedings. Since the defendant had opened the door by introducing the subject of Waterman's grand jury testimony, the government had the right to develop more fully what had in fact taken place before the grand jury. Thus, there could have been, and indeed there was, no serious objection to cross-examination of this witness as to the manner in which he consulted with clients (see the Statement, *supra*). It was equally proper to ask what he had said before the grand jury about fees paid by the clients, particularly since Waterman on direct had testified as to his records concerning some fees. And it was part of that whole picture to show that before the grand jury Waterman had claimed the privilege with respect to his records regarding fees.

Moreover, as the court below pointed out, the impression which Waterman's testimony on direct tended to convey was that he had answered all questions asked of him and that his grand jury testimony had been completely consistent with his direct. But on direct examination petitioner had testified as to what his records showed, and before the grand jury petitioner had refused to answer questions about his records. Petitioner could not create one impression by his direct testimony at the trial and then prevent the government from showing that such direct testimony was not true. This is the rationale of this Court's decision in *Walder* v. *United States*, 347 U. S. 62, where it was held that a defendant's assertion that he had never dealt in narcotics opened the door, solely

for the purpose of attacking his credibility, to evidence of heroin unlawfully seized and suppressed in an earlier proceeding. This case does not present the question whether under *Grunewald* v. *United States*, 353 U. S. 391, the government could, in the first instance, have brought up the subject of the claim of privilege before the grand jury by a witness. But even if it be assumed, *arguendo*, that it could not have done so, just as the government in *Walder* could not have initially used the suppressed evidence, that does not go to the issue of the government's right to pursue a line of examination opened up by the defense, to counteract the false impression elicited by the defense on direct examination of the witness.

As the Court of Appeals noted, there was, in this case, no real possibility that the showing of the claim of privilege would be of such danger to the defense as to override the considerations justifying the admission of the testimony. Unlike *Grunewald*, and unlike *Walder*, *supra*, the witness Waterman was not a defendant. Moreover, Waterman did not enter the picture until after petitioner had filed the fraudulent passport applications. Thus, there was little danger that the jury could infer, from this relationship, that petitioner was guilty because Waterman had invoked the Fifth Amendment, and the judge immediately instructed that the raising of the issue was "not in any way to reflect upon the defendant" (R. 701). The purpose of Waterman's testimony at the trial was to show that he had consulted with the "fathers" before he filed the declaratory judgment suits. This did tend to contradict the testimony of the government

witnesses that they had been taken to a lawyer's office but did not talk to the white men present. But it did not go to the heart of the case or of the witnesses' testimony, and was not of such character that the jury could not have found petitioner guilty, even if Waterman's testimony was credited.

2. There is no merit to petitioner's argument, raised for the first time on appeal below, that the government improperly used for purpose of cross-examination tax returns illegally obtained in violation of applicable regulations. Copies of returns, submitted by petitioner for the years 1951 and 1952, were used only to refresh petitioner's recollection after he stated that to recall his income he would have to refer to them (R. 864). Petitioner's sole objection at that time was that they could only be used in an income tax prosecution (R. 867), an objection properly overruled. *Levy* v. *United States*, 29 F. 2d 462 (C. A. 7), certiorari denied, 279 U. S. 850; *United States* v. *Rollnick*, 91 F. 2d 911, 918 (C. A. 2). Since the United States Attorney manifestly had the returns, it is reasonable to assume that there had been a proper written request therefor as required by Federal Tax Regulation (1954), Sec. 458.204. The government assured the court below that, had the question of proper authorization been raised, it was prepared to show that the returns had been procured in a proper manner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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